

WILMER CUTLER PICKERING
HALE AND DORR LLP
Molly S. Boast (*admitted pro hac vice*)
7 World Trade Center
250 Greenwich Street
New York, NY 10007
Telephone: (212) 230-8800
Facsimile: (212) 230-8888
molly.boast@wilmerhale.com

Christopher E. Babbitt (*admitted pro hac vice*)
1875 Pennsylvania Avenue NW
Washington, DC 20006
Telephone: (202) 663-6000
Facsimile: (202) 663-6363
christopher.babbitt@wilmerhale.com

Christopher T. Casamassima (*admitted pro hac vice*)
350 South Grand Ave.
Los Angeles, CA 90071
Telephone: (213) 443-5300
Facsimile: (213) 443-5400
chris.casamassima@wilmerhale.com

STEPTOE & JOHNSON LLP
Paul K. Charlton (012449)
Karl M. Tilleman (013435)
201 East Washington Street, Suite 1600
Phoenix, Arizona 85004-2382
Telephone: (602) 257-5200
Facsimile: (602) 257-5299
pcharlton@steptoe.com
ktilleman@steptoe.com

Attorneys for Defendant

**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

SolarCity Corporation,

Plaintiff,

vs.

Salt River Project Agricultural Improvement
and Power District,

Defendant.

Case No. 2:15-CV-00374-DLR

**DEFENDANT SALT RIVER
PROJECT AGRICULTURAL
IMPROVEMENT AND POWER
DISTRICT'S NOTICE OF
APPEAL**

1 Notice is hereby given that Defendant Salt River Project Agricultural Improvement
2 and Power District (the “District”) appeals to the United States Court of Appeals for the
3 Ninth Circuit from the Order Granting in Part and Denying in Part Defendant’s Motion to
4 Dismiss, entered in this action by the Honorable Douglas L. Rayes in the United States
5 District Court for the District of Arizona on October 27, 2015, ECF No. 77.

6 The Court correctly held that “[a]s a matter of law, the District is a political
7 subdivision of the state [of Arizona] created by state law and the state constitution,” and that
8 “SolarCity’s allegations do not undermine the District’s status.” ECF No. 77 at 23.
9 Accordingly, the Court held that, as a political subdivision, the District was immune from
10 antitrust damages under the Local Government Antitrust Act, 15 U.S.C. § 35(a). ECF No.
11 77 at 22-23. The Court also dismissed Plaintiff’s claims under Section 1 of the Sherman Act
12 and its state law analogue for failure to state a claim. ECF No. 77 at 16-18. The Court,
13 however, denied the District’s motion to dismiss asserting immunity from suit under both the
14 state action immunity doctrine and A.R.S. § 12-820.01, ECF No. 77 at 23, 24-25, thereby
15 allowing to proceed Plaintiff’s claim under Section 2 of the Sherman Act (and its state law
16 analogue), as well as claims for tortious interference under state law. ECF No. 77 at 19-20,
17 22.

18 Ninth Circuit precedent holds that denials of immunities from suit are subject to
19 immediate appellate review. *See DC Comics v. Pac. Pictures Corp.*, 706 F.3d 1009, 1015
20 (9th Cir. 2013). The state action doctrine provides such an immunity from suit and therefore
21 should be treated as immediately appealable. *See Phillip E. Areeda & Herbert Hovenkamp*,
22 *Fundamentals of Antitrust Law*, § 2.04b, at 2-51 (4th ed. 2011, 2015 Supp.) (state action
23 doctrine “is designed to be an immunity, not merely a defense that can be offered at trial”);
24 *see also N.C. State Bd. of Dental Exam’rs v. FTC*, 135 S. Ct. 1101, 1110 (2015) (state action
25 doctrine “confer[s] immunity on anticompetitive conduct by the States when acting in their
26 sovereign capacity”). Thus, two circuits have concluded that a denial of state action
27 immunity, as an immunity from suit, constitutes an immediately appealable collateral order.
28 *See Commuter Transp. Sys., Inc. v. Hillsborough Cty. Aviation Auth.*, 801 F.2d 1286, 1289

1 (11th Cir. 1986) (denial of state action immunity is immediately appealable as an immunity
2 from suit); *Martin v. Mem'l Hosp. at Gulfport*, 86 F.3d 1391, 1397 (5th Cir. 1996) (same).
3 Two other circuits have noted that state action immunity is immediately appealable in dicta.
4 *See We, Inc. v. City of Philadelphia*, 174 F.3d 322, 329 (3d Cir. 1999); *Segni v. Commercial*
5 *Office of Spain*, 816 F.2d 344, 346 (7th Cir. 1987). However, two other circuits have held
6 that the denial of state action immunity is not immediately appealable. *See S.C. State Bd. of*
7 *Dentistry v. FTC*, 455 F.3d 436, 443 (4th Cir. 2006); *Huron Valley Hosp., Inc. v. City of*
8 *Pontiac*, 792 F.2d 563, 567-68 (6th Cir. 1986).

9 A.R.S. § 12-820.01 provides public entities such as the District “absolute immunity”
10 from suits for damages under state law. *Kohl v. City of Phoenix*, 160 P.3d 170 (Ariz. 2007)
11 (en banc); *Acevedo by Acevedo v. Pima Cty. Adult Probation Dep’t*, 690 P.2d 38, 41 (Ariz.
12 1984) (en banc) (Arizona provides absolute immunity to those entities and officials who
13 “require protection from suit to carry out their duties”). And Arizona courts permit
14 immediate appellate review of denials of immunity under Title 12. *See Tucson Unified Sch.*
15 *Dist. v. Borek*, 322 P.3d 181, 184 (Ariz. Ct. App. 2014); *see also Pinal County v. Cooper ex*
16 *rel. Cty. of Maricopa*, --- P.3d ----, 2015 WL 6157397, at *2 (Ariz. Ct. App. Oct. 20, 2015)
17 (immediate appeal of immunity claims appropriate “because a party who claims immunity
18 from suit loses the benefit of the immunity if he is forced to stand trial, and therefore has no
19 adequate remedy by direct appeal”). The Arizona courts’ treatment of Title 12 illustrates
20 that it is an immunity from suit, the denial of which is immediately appealable. *See DC*
21 *Comics*, 706 F.3d at 1016; *Godin v. Schencks*, 629 F.3d 79, 85 (1st Cir. 2010) (availability of
22 immediate appeal under state law indicates whether claimed immunity is a true immunity or
23 a defense to liability).

24 In accordance with Fed. R. App. P. 12(b) and Ninth Circuit Rule 3-2(b), a
25 Representation Statement is also attached hereto.

1 RESPECTFULLY SUBMITTED this 20th day of November, 2015

2
3 STEPTOE & JOHNSON LLP
4 Paul K. Charlton
5 Karl M. Tilleman
6 201 East Washington Street, Suite 1600
7 Phoenix, AZ 85004
8 Telephone: (602) 257-5200
9 Facsimile: (602) 257-5299
pcharlton@steptoe.com
ktilleman@steptoe.com

/s/ Christopher E. Babbitt
WILMER CUTLER PICKERING HALE AND
DORR LLP
Molly S. Boast
7 World Trade Center
250 Greenwich Street
New York, NY 10007
Telephone: (212) 230-8800
Facsimile: (212) 230-8888
molly.boast@wilmerhale.com

10 Christopher E. Babbitt
11 1875 Pennsylvania Avenue NW
12 Washington, DC 20006
13 Telephone: (202) 663 6000
Facsimile: (202) 663 6363
christopher.babbitt@wilmerhale.com

14 Christopher T. Casamassima
15 350 South Grand Ave.
16 Los Angeles, CA 90071
17 Telephone: (213) 443-5300
Facsimile: (213) 443-5400
chris.casamassima@wilmerhale.com

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19 Attorneys for Defendant
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CERTIFICATE OF SERVICE

I hereby certify that on November 20, 2015, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

BOIES, SCHILLER & FLEXNER LLP
300 South Fourth Street, Suite 800
Las Vegas, NV 89101
Richard J. Pocker

BOIES, SCHILLER & FLEXNER LLP
5301 Wisconsin Avenue, NW
Washington, DC 20015
William A. Isaacson
Karen L. Dunn

BOIES, SCHILLER & FLEXNER LLP
1999 Harrison Street, Suite 900
Oakland, CA 94612
Steven C. Holtzman
John F. Cove, Jr.
Kieran P. Ringgenberg
Sean P. Rodriguez

COPPERSMITH BROCKELMAN PLC
2800 North Central Avenue, Suite 1200
Phoenix, AZ 85004
Keith Beauchamp
Roopali H. Desai

/s/Christopher E. Babbitt